

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Waiver of Digital Testing Pursuant	)	
To the Satellite Home Viewer Extension	)	MB Docket No. 05-317
And Reauthorization Act of 2004	)	

**ORDER**

**Adopted: October 25, 2007**

**Released: October 26, 2007**

By the Chief, Media Bureau:

1. In December 2004, Congress enacted the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”),<sup>1</sup> which amended the copyright laws and the Communications Act of 1934, as amended (the “Act”), to further aid the competitiveness of satellite carriers and expand program offerings for their subscribers. Specifically, SHVERA amended Section 339(a)(2)(D) of the Act to permit satellite subscribers to qualify for satellite retransmission of distant digital network signals under circumstances specified in the Act.<sup>2</sup> Of relevance here, a satellite subscriber whose household is predicted to be served<sup>3</sup> by the analog signal of a local network station, and who is seeking a distant digital signal of another station affiliated with the same network as that local network station, may attempt to demonstrate eligibility for reception of the distant digital signal via satellite based on a signal test to determine if the over-the-air digital signal of the local network station does not meet the digital signal intensity standard in Section 73.622(e)(1) of the Commission’s rules.<sup>4</sup>

2. SHVERA also amended Section 339(a)(2)(D)(viii) of the Act to provide for stations to request a waiver that would prohibit satellite subscribers from receiving or conducting a digital signal strength test.<sup>5</sup> The statute further provided that such waiver requests must be filed no later than November 30, 2005 for a local station in one of the top 100 television markets that had received a tentative channel designation on its allotted digital channel or had lost interference protection.<sup>6</sup> The

<sup>1</sup> The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207, 118 Stat 2809, 3393 (2004) (to be codified at 47 U.S.C. § 339), § 204(b). SHVERA was enacted as title IX of the “Consolidated Appropriations Act, 2005.”

<sup>2</sup> See 47 U.S.C. § 339(a)(2)(D)(i)(III), as amended by Section 204 of SHVERA.

<sup>3</sup> See 47 U.S.C. § 339(c)(3) (mandating the Individual Location Longley-Rice (ILLR) model to predict the ability of individual locations to receive analog signals of Grade B intensity).

<sup>4</sup> See 47 U.S.C. § 339(a)(2)(D)(i)(I), as amended by Section 204 of SHVERA.

<sup>5</sup> See 47 U.S.C. § 339(a)(2)(D)(viii), as amended by Section 204 of SHVERA. The statute provided that a subscriber could request such a test beginning April 30, 2006, if such local network station is within the top 100 television markets and has received a tentative channel designation on its allotted digital channel or has lost interference protection; or, beginning July 15, 2007, for any other full power local network station. See 47 U.S.C. § 339(a)(2)(D)(vii), as amended by Section 204 of SHVERA.

<sup>6</sup> See, e.g., *Television Station Requests for Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 to be Filed by November 30, 2005 or February 15, 2007*, DA 05-2979 (November 17, 2005).

Commission is authorized to grant a waiver for up to six months, and to renew the waiver upon a proper showing that the station's digital signal coverage continues to be limited due to the unremediable presence of one of the six statutory criteria.

3. By Order adopted April 28, 2006,<sup>7</sup> the Media Bureau granted six-month digital testing waivers for 23 stations, finding that their digital signal coverage was limited due to the need for international coordination or approvals, clear zoning or environmental legal impediments, or force majeure. Fifteen of these stations filed for a six-month extension, and by Order adopted October 30, 2006,<sup>8</sup> the Media Bureau granted an additional six-month extension for all of these stations. Nine of these stations requested a second six-month extension, and by Order adopted April 30, 2007,<sup>9</sup> the Media Bureau granted the requested extensions. It also stated that if further extensions are needed, such requests must be filed by August 15, 2007, with oppositions filed with the Commission and served on the relevant parties by August 24, 2007 and replies no later than August 31, 2007.<sup>10</sup>

4. Seven permittees or licensees have requested further extension of the testing waivers granted on April 30, 2007, and all of these requests are unopposed. We have carefully considered each digital testing waiver extension request, as directed by Congress. As before, we have considered all of the facts presented by the parties, as well as station filings and information contained in the Commission's Consolidated Database System, which are available to the public. We hereby grant all seven requests for the reasons set forth below. Again, we emphasize that denial of a waiver request will not automatically result in the delivery of a distant digital signal to a subscriber, but merely permits a subscriber to request a digital signal test.<sup>11</sup> If further waiver extensions are needed, and in order to ensure action before the April 30, 2008 expiration date of the waiver extensions granted herein, permittees and licensees must file any further extension requests by March 14, 2008. Any opposition to such further extensions should be filed with the Commission and served on the relevant parties by March 24, 2008, and any replies to such oppositions should be filed and served no later than March 31, 2008.

5. **Need for International Coordination or Approvals.** Section 339(a)(2)(D)(viii)(I) of the Act acknowledges that a station's digital signal coverage may be limited due to the need for international coordination or approval of applications for a new or modified digital construction permit. The Bureau initially granted ten waiver requests under this criteria, and three of these stations have filed for a third extension; Telefutura Los Angeles LLC ("Telefutura"), the permittee of KFTR-DT (TEL), Ontario, California; KVOA Communications, Inc. ("KVOA"), the permittee of KVOA-DT (NBC), Tucson, Arizona; and WSMH Licensee LLC ("WSMH"), the permittee of WSMH-DT (FOX), Flint, Michigan. Telefutura and WSMH state that they are unable to complete construction of their authorized DTV facilities because international coordination is still on-going. Accordingly, we grant a six-month extension of the digital testing waivers for KFTR-DT and WSMH-DT. KVOA states that the need to

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<sup>7</sup> *In the Matter of Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("First Round Order")*, 21 FCC Rcd 4813 (MB 2006). The Bureau also granted a second round of waivers to 23 stations not subject to the April 30, 2006 deadline. These stations were instead subject to a testing deadline of July 15, 2007. See note 5, *supra*. Extension requests for these second round waivers must be filed no later than November 15, 2007. *In the Matter of Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("Second Round Order")*, DA 07-3201 (MB released July 13, 2007).

<sup>8</sup> *In the Matter of Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 21 FCC Rcd 12894 (MB 2006).

<sup>9</sup> *In the Matter of Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 22 FCC Rcd 8430 (MB 2007) ("*Second Digital Testing Waiver Extension Order*").

<sup>10</sup> *Second Digital Testing Waiver Extension Order*, 22 FCC Rcd at 8431.

<sup>11</sup> *Id.*

obtain concurrence from the Mexican government prevented the Commission from granting its application for a digital construction permit until May 15, 2007. KVOA further states that it will complete construction of its authorized digital facilities by November 15, 2007, the date on which its construction permit expires. Because KVOA has had less than six months to complete construction, we will grant a six-month extension of the digital testing waiver for KVOA-DT.

6. **Zoning or Environmental Legal Impediments.** Section 339(a)(2)(d)(vii)(II) of the Act permits a waiver based upon a showing that the station's digital signal coverage is limited because of the "unremediable" presence of "clear zoning or environmental legal impediments." The Bureau initially granted ten waiver requests under this criterion, and two of these stations have filed for a third six-month extension.

7. Raycom National, Inc. ("Raycom"), the permittee of stations KHNL-DT (NBC), Honolulu, Hawaii and KOGG-DT (NBC), Wailuku, Hawaii, also request extensions based on zoning and environmental impediments. With respect to KHNL-DT,<sup>12</sup> the Honolulu City Council passed an ordinance in the 1980's banning construction of any new television and radio towers. KHNL-DT is currently operating at reduced facilities. While Raycom has located an existing site to construct its maximized DTV facilities for KHNL-DT, it cannot construct its maximized facility until an existing analog antenna is removed at the end of the DTV transition. With respect to KOGG-DT, Raycom reported in its first extension request that it had entered into an agreement for an acceptable site for its digital facilities, and filed the required applications for the right to subdivide the property. Raycom has since filed a minor modification application to move to the new site, which is still pending.<sup>13</sup> According to Raycom, it believes that the site owner will soon complete the required environmental study and that the site will be operational within the next five months. Because these stations' digital signals are limited due to clear zoning or environmental impediments, we grant a six-month extension of the digital testing waivers for KHNL-DT and KOGG-DT.

8. **Force Majeure.** SHVERA further provides that a waiver request may be granted when the station's digital signal coverage is limited due to force majeure.<sup>14</sup> Force majeure is defined as "an unexpected and disruptive event which may operate to excuse a party from a contract."<sup>15</sup> The Media Bureau initially granted four waiver requests under this criterion, and two of these stations have filed for an additional six-month extension.

9. The DTV transmitter of NBC Telemundo License Co., the permittee of WNBC-DT (NBC), New York, New York, was located on the World Trade Center, which was destroyed in the terrorist attack on September 11, 2001. The Freedom Tower, which is to be built at the site of the destroyed World Trade Center, has not yet been constructed. The terrorist attack in 2001 clearly constitutes force majeure and justifies grant of a six-month extension of the digital testing waiver for WNBC-DT.

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<sup>12</sup> *Id.* at 4819-20.

<sup>13</sup> File No. BMPCDT-20061206AAH.

<sup>14</sup> See 47 U.S.C. § 339(a)(2)(D)(viii)(III).

<sup>15</sup> *Webster's Encyclopedic Unabridged Dictionary of the English Language* at 554 (1989). Force majeure is broader than "act of God," which is limited to natural forces, and may be defined as an event that can be neither anticipated nor controlled, including a terrorist attack as an extreme, unforeseeable occurrence. See *Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd 16333, 16347 at n.97 (2003), citing *Black's Law Dictionary* 254 (Pocket Edition 1996); cf. *OWBR, LLC v Clear Channel Communications, Inc.*, 266 F. Supp. 2d 1214 (D. Haw. 2003)..

10. The analog and digital facilities of New Orleans Hearst-Argyle Television Inc. (“Hearst-Argyle”), the permittee of WDSU-DT (NBC), New Orleans, Louisiana, were destroyed by Hurricane Katrina in September 2005. Hearst-Argyle was able to restore its analog signal at a temporary site, but remains unable to construct its digital facilities. In its most recent application for Special Temporary Authorization to remain silent,<sup>16</sup> Hearst-Argyle states that it has begun construction of a new transmitter building for both its analog and digital facilities, and projects that WDSU-DT will be fully operational by mid-2008. Hurricane Katrina clearly constitutes force majeure and justifies the grant of a six-month extension of the digital testing waiver for WDSU-DT.

11. ACCORDINGLY, IT IS ORDERED that the requests of the television stations set forth in Appendix A of this Order ARE GRANTED and the first permissible date for digital testing for these stations IS EXTENDED six months, from October 31, 2007 to April 30, 2008. Any further waiver extension requests must follow the pleading schedule set forth above.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai  
Chief, Media Bureau

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<sup>16</sup> File No. BLESTA-20070425AFJ, granted June 4, 2007.

**APPENDIX A**

KFTR-DT	Ontario, California
KHNL-DT	Honolulu, Hawaii
KOGG-DT	Wailuku, Hawaii
KVOA-DT	Tucson, Arizona
WDSU-DT	New Orleans, Louisiana
WNBC-DT	New York, New York, Louisiana
WSMH-DT	Flint, Michigan